85-1342

No.

Supreme Court, U.S.
FILED
FEB 11 19
JOSEPH F. SPANIOL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO PARK DISTRICT, *et al.*,

Petitioners,

v.

SILAS J. ALEXANDER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS A. FORAN
JACK J. CARRIGLIO*
JEFF D. HARRIS
DOUGLAS R. STEVENS
FORAN, WISS & SCHULTZ
30 North LaSalle Street
Suite 3000
Chicago, Illinois 60602
(312) 368-8330
Attorneys for Petitioners Chicago Park District, et al.
**Counsel of Record*

Pandick Midwest, Inc., Chicago • 733-6000

QUESTION PRESENTED FOR REVIEW

Whether local government employees may avoid the comprehensive remedial scheme of Title VII, 42 U.S.C. §§ 2000e to 2000e-17, by utilizing 42 U.S.C. § 1983 to redress employment discrimination claims which are cognizable under Title VII.

PARTIES BEFORE THE COURT OF APPEALS

The Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh, all petitioners herein, and William A. Lee were named as appellees before the court of appeals.

The appellants below were Silas J. Alexander and others*, respondents herein.

---

* The other appellants who were named-plaintiffs before the district court are Karen Turner, Renee Bradford, Lillian Schrean, Joel Alexander, Earline Oglesby, Martha McGee, Althea Tucker, Rosemary Garrett, Latoski McCarthy Dillon, Beverly Gray, Anthony Gray, Arlene Gaston, Willie Gaston, Angel Gomez, Juan Gomez, Luis Diaz, Luis Flores, Comite Latino, Clara Evans, Christopher Delano Barnett, Oscar Wells, Terry Lee Fisher, Agnes Bernaugh, William Hall, Charles Adkins and Natalie Lyle.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES BEFORE THE COURT OF APPEALS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT:	
I. THE DECISION OF THE SEVENTH CIRCUIT IMPROPERLY FAILS TO APPLY THE MOST ANALOGOUS AND RECENT SUPREME COURT AUTHORITY AND MISAPPLIES OTHER DECISIONS OF THIS COURT	7
A. Introduction	7
B. The Seventh Circuit Ignored The Important *Sea Clammers* And *Smith v. Robinson* Decisions Of This Court	9
C. The Analysis Below Of *Novotny* And *Brown v. GSA* Was Inadequate	14
D. This Court's Most Controlling Authority Demonstrates The Error Of The Seventh Circuit's Decision	19
II. THE SEVENTH CIRCUIT RULING PRODUCES AN UNFAIR AND ANOMALOUS RESULT	20
III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ABOUT WHICH CONSIDERABLE CONFUSION EXISTS AMONG LOWER COURTS	22
IV. CONCLUSION	26

TABLE OF AUTHORITIES

PAGE

CASES

Alexander v. Chicago Park District, 773 F.2d 850 (7th Cir. 1985) 1, 5, 6, 7, 8, 9, 12, 20, 21, 22, 23, 26

Alexander v. Chicago Park District, 709 F.2d 463 (7th Cir. 1983) 2

Alexander v. Chicago Park District, 548 F.Supp. 277 (N.D. Ill. 1982) 2

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 19

Allen v. McCurry, 449 U.S. 90 (1980) 17

Baker v. F&F Investment Co., 489 F.2d 829 (7th Cir. 1973) 18

Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), *cert. denied sub nom. Mitchell v. Beard*, 438 U.S. 907 (1978) 8

Blum v. Stenson, 465 U.S. 886 (1984) 12

Brown v. General Services Administration, 425 U.S. 820 (1976) 9, 14, 15, 16, 19, 20, 21, 23, 26

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 17, 18

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 12

Day v. Wayne County Board of Auditors, 749 F.2d 1199 (6th Cir. 1984) 21, 22, 23, 24

	PAGE
Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366 (1979)	8, 9, 14, 16, 17, 18, 19, 20, 22, 23
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)	18
Keller v. Prince George's County Department of Social Services, 616 F.Supp. 540 (D. Md. 1985)	23, 24
Meyett v. Coleman, 613 F.Supp. 39 (W.D. Wis. 1985)	24
Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981)	9, 10, 11, 12, 13, 14, 16, 19, 21, 23, 24, 25
Midwest Community Council, Inc. v. Chicago Park District, 79 C 3187 (N.D. Ill. September 16, 1983)	4
Monroe v. Pape, 365 U.S. 167 (1961)	17
O'Sullivan v. Felix, 233 U.S. 318 (1914)	8
Preiser v. Rodriguez, 411 U.S. 475 (1973)	6, 15
Pulliam v. Allen, ____ U.S. ____, 104 S.Ct. 1970 (1984)	24
Ratliff v. City of Milwaukee, 608 F.Supp. 1109 (E.D. Wis. 1985)	24
Reiter v. Center Consolidated School District No. 26-JT, 618 F.Supp. 1458 (D. Colo. 1985)	23, 24
Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir. 1982)	23, 24

	PAGE
Smith v. Robinson, ____ U.S. ____, 104 S.Ct. 3457 (1984)	9, 11, 12, 13, 16, 20, 23, 24, 25
Smith v. Wade, 461 U.S. 30 (1983)	8
Storey v. Board of Regents, 600 F.Supp. 838 (W.D. Wis. 1985)	24
Strama v. City of Chicago, 617 F.Supp. 422 (N.D. Ill. 1985)	24
Torres v. Wisconsin Department of Health and Social Services, 592 F.Supp. 922 (E.D. Wis. 1984)	24
Trigg v. Fort Wayne Community Schools, 766 F.2d 299 (7th Cir. 1985)	6, 8, 9, 12, 14, 15, 16, 17, 18, 20, 23, 24
United States v. Turkette, 452 U.S. 576 (1981)	12
Zewde v. Elgin Community College, 601 F.Supp. 1237 (N.D. Ill. 1984)	24

Constitutions

U.S. CONST. amend. XIV, §1	2, 5, 6, 7, 12, 23
ILL. CONST. art. I, §2	5, 6, 7

PAGE

Statutes

20 U.S.C. §§1401-61 ..... 11, 12, 13
28 U.S.C. §1254(1) 2
28 U.S.C. §1343(a)(3) 3
33 U.S.C. §§1251-1376 ..... 10, 13, 14
33 U.S.C. §1365(e) 14
33 U.S.C. §§1401-45 10
42 U.S.C. §1981 18
42 U.S.C. §1983 ..... *passim*
42 U.S.C. §1985(3) 16, 17, 20, 22
42 U.S.C. to 2000e-17 ..... *passim*

Other Authorities

FED.R.CIV.P. 54 4
FED.R.CIV.P. 59 4
S.Rep. No. 92-414 92d Cong., 2d Sess. 81, *reprinted in* [1972] U.S. Code Cong. & Ad. News, 3668, 3746 ..... 13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHICAGO PARK DISTRICT, *et al.*,

Petitioners,

v.

SILAS J. ALEXANDER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Chicago Park District, Edmund Kelly, Patrick O'Malley, Theodore Jones, Jean Foran, Sydney Marovitz, Iola McGowan, Raymond F. Simon, William Bartholomay and John McHugh respectfully pray that a writ of certiorari issue to review a portion of the judgment and opinion entered in this proceeding by the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The original opinion of the court of appeals is reported at 773 F.2d 850. The court of appeals' November 13, 1985 correction of the original opinion, which was not incorporated

into the reported advance sheets, appears in the Appendix hereto, which is separately bound. The district court's order, which was not reported, also appears in the Appendix. A prior interlocutory appeal to the court of appeals is reported at 709 F.2d 463 and a pretrial ruling of the district court is reported at 548 F.Supp. 277.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1985. The court of appeals denied petitioners' timely petition for rehearing by order entered on November 13, 1985. This petition for certiorari was filed within ninety (90) days of the denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend XIV, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. §§ 2000e to 2000e-17 is too lengthy to set out here. The complete text appears in the Appendix.

STATEMENT OF THE CASE

The controversy herein centers on whether the respondents ("Alexander") may utilize 42 U.S.C. § 1983 ("Section 1983") to redress their claims of discrimination in their employment with the Chicago Park District, a local government entity, despite the fact that 42 U.S.C. §§ 2000e to 2000e-17 ("Title VII") provides a specific and comprehensive remedial scheme which fully redresses all of Alexander's claims.

This action began in 1979, when Alexander filed a class action on behalf of all black, Hispanic and poor Chicago residents against the Chicago Park District, its attorneys, superintendent, and past and present commissioners (collectively "Park District"). Alexander invoked the district court's jurisdiction under 28 U.S.C. § 1343(a)(3). Alexander made several amendments to his complaint, ultimately asserting four counts against the Park District in his third amended complaint, all of which were brought under Section 1983. Count I alleged that the Park District discriminated against the class of persons represented by Alexander by allocating less funds and other resources to parks located in predominantly black neighborhoods than to parks in other neighborhoods. The other three counts were also premised on the alleged discriminatory allocation of resources, but added additional allegations of discrimination. Counts II and III alleged discrimination in employment by the Park District. Count IV was a claim for personal injuries which allegedly arose out of the discriminatory allocation of resources alleged in count I.

Count I was tried in 1983, in a jury trial which lasted more than three months. Tried at the same time were all claims in the companion case of *Midwest Community Council, Inc. v. Chicago Park District*, No. 79 C 3187 (N.D. Ill., September 16, 1983), in which the plaintiffs asserted similar claims of racial discrimination in the allocation of resources by the Park District. On August 17, 1983, a jury returned a verdict in favor of all defendants and against all plaintiffs in *Alexander*, and the district court entered judgment on the verdict. Appendix at 42a. Subsequently, the court entered judgment in favor of the Park District in the companion case of *Midwest* and issued its own findings of fact and conclusions of law for that case. No appeal was taken from the *Midwest* judgment.

On August 29, 1983, Alexander filed a motion pursuant to Federal Rule of Civil Procedure 59 asking for the entry of an order amending the judgment or granting a new trial. On September 23, 1983, the trial court denied the motion. Appendix at 35a. On that same date the court entered an order disposing of count IV of the third amended complaint on a summary judgment and dismissing, under Federal Rule of Civil Procedure 54(b), counts II and III to allow the parties to take appeal from all orders entered in the case. Appendix at 36a.

Alexander did not pursue an appeal but instead filed a fourth amended complaint in six counts. Appendix at 44a. The new complaint was also brought under Section 1983. Count I was almost identical to count I of the prior complaint, which was the subject of a three month trial. The new counts II and IV were essentially the same as counts II and III of the prior complaint. New counts III and V also alleged employment discrimination, but were based on alleged violations of federal funding regulations. New count VI restated the personal injury claims previously alleged in count IV of the prior complaint.

The Park District moved to dismiss the fourth amended complaint, asserting several grounds including *res judicata* and the failure of certain counts to state a claim under Section 1983.

The district court granted the motion to dismiss on all counts on October 18, 1984. Appendix at 16a. Counts I, V and VI of the fourth amended complaint were dismissed on *res judicata* grounds. Appendix at 30a. Counts II, III and IV, all employment discrimination counts, were dismissed on the ground that these claims were improperly brought under Section 1983. The court held that the general Section 1983 remedy was preempted in this context by the more specific and comprehensive remedial scheme provided in Title VII. Appendix at 31a-34a.

Alexander appealed and, in its order of September 19, 1985, the Seventh Circuit affirmed the dismissal of counts I, V, and VI, but reversed the dismissal of counts II, III and IV. Appendix at 12a. On November 13, 1985, upon the Park District's petition for rehearing, the Seventh Circuit corrected its earlier opinion to affirm the dismissal of count III, as well as the counts previously dismissed. Appendix at 14a-15a. This petition for certiorari asks this Court to address the Seventh Circuit's reversal of the dismissal of the remaining two claims of employment discrimination: counts II and IV.

In count II of his fourth amended complaint, Alexander charges employment discrimination under Section 1983 and purports to sue on behalf of all black residents of Chicago who have been injured by the employment discrimination alleged. Alexander asserts that this employment discrimination violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Illinois Constitution. The count addresses a Civil Service Examination given by the Park District on November 1, 1977 for the position of physical instructor which Alexander contends was not job-related. He asks the court to void the examination, grant other injunctive relief, and award money damages. Appendix at 48a-54a.

In count IV, Alexander again alleges violations of the due process and equal protection clauses of the United States and Illinois Constitutions, which he attempts to have remedied through Section 1983. He alleges that the Park District has discriminated against his class with respect to the hiring, assignment and payment of personnel. He seeks both monetary and injunctive relief in count IV. Appendix at 57a-61a.

The district court dismissed both of these counts for failure to state a claim under Section 1983. That court stated that these are both claims for employment discrimination which are actionable under Title VII. It held that Alexander may not bring an action under Section 1983 to redress what are, in effect, Title VII claims. To allow otherwise, the court stated, would permit Alexander to completely bypass Title VII's comprehensive administrative scheme "by the simple expedient of putting a different label on [the] pleadings." Appendix at 34a, quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973).

The Seventh Circuit reversed this aspect of the district court's ruling, holding that Title VII is not the sole remedy for employment discrimination claims of state employees. In so holding, the Seventh Circuit followed its own recent decision in *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985). Appendix at 10a-11a. It remanded counts II and IV to the district court. Appendix at 15a.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE SEVENTH CIRCUIT IMPROPERLY FAILS TO APPLY THE MOST ANALOGOUS AND RECENT SUPREME COURT AUTHORITY AND MISAPPLIES OTHER DECISIONS OF THIS COURT

A. Introduction

Both counts II and IV of Alexander's fourth amended complaint are claims for employment discrimination in which Alexander seeks injunctive relief, reinstatement, back pay and damages. In both, Alexander pleads that he brings the action under the Due Process and Equal Protection clauses of the Fourteenth Amendment, a section of the Illinois Constitution and Section 1983. Although the wrongful acts alleged in these claims are clearly within the scope of Title VII, Alexander has never sought to utilize any of the remedial mechanisms of Title VII. The issue presented here is whether Alexander may assert claims which are cognizable under Title VII under the guise of a Section 1983 complaint, and thereby completely bypass the Title VII administrative and judicial procedure. The district court, citing several decisions of this Court, held that he may not. The court of appeals, citing some of the same decisions, reversed the district court and held that Alexander may avoid Title VII by pleading under Section 1983. This petition asks this Court to review this issue and provide guidance on an important recurring question of federal law.

The difference between pursuing a discrimination claim under Section 1983 and pursuing a similar claim under Title VII is vast. Under Title VII, a complainant may not bring an action in federal district court unless and until he has fully pursued that claim through proper administrative channels. A complainant must first file an administrative charge with either the Equal Employment Opportunity Commission (EEOC) or a

corresponding state or local government agency. Title VII contains short express time limitations for such filings. At several different points, the statutory plan prevents the complainant from immediately filing judicial proceedings in order to encourage voluntary conciliation. The EEOC has the power to investigate and to institute its own civil proceedings. A complainant may only bring his own action upon the issuance by the EEOC of written authorization to do so. Most courts have held that Title VII does not allow a court to award either compensatory or punitive damages and that, because only equitable remedies are authorized, neither party has a right to a jury trial. *See Great American Federal Savings and Loan Association v. Novotny*, 442 U.S. 366, 373-75 (1979).

Under Section 1983, by contrast, there is no administrative aspect to the remedy. A plaintiff may proceed directly into federal district court with his claim. Unlike Title VII, under Section 1983 a plaintiff may also recover damages and demand a jury trial. *Smith v. Wade*, 461 U.S. 30 (1983). The limitation periods applicable to Section 1983 actions are controlled by state law and may be several years long. *Beard v. Robinson*, 563 F.2d 331, 334 (7th Cir. 1977), *cert. denied sub nom. Mitchell v. Beard*, 438 U.S. 907 (1978); *see generally O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914). Therefore, whether or not plaintiffs like Alexander may bypass Title VII's scheme through the use of Section 1983 has a significant effect on the conduct of the proceedings, the rights of the parties and the utilization of judicial resources.

The Seventh Circuit's reversal of the dismissal of counts II and IV is based almost exclusively on its own recent decision in *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985). The circuit court opinion in this case does not make an independent analysis of the issue presented here. Hence, this petition will make frequent reference to the *Trigg* opinion.

The holding and underlying reasoning in *Trigg* are flawed. The court in *Trigg* failed to address the two most recent and significant decisions of this Court which bear on the issue of whether Title VII preempts Section 1983 in the employment discrimination context. Both *Middlesex County Sewerage Authority v. National Sea Clammers Association ("Sea Clammers")*, 453 U.S. 1 (1981), and *Smith v. Robinson*, ____ U.S. ____, 104 S.Ct. 3457 (1984), must weigh heavily in this analysis. The Seventh Circuit's failure in both *Trigg* and this case to address these decisions renders incomplete and faulty that court's analysis of those Supreme Court decisions it did consider.

B. The Seventh Circuit Ignored The Important *Sea Clammers* and *Smith v. Robinson* Decisions Of This Court

This Court has never decided whether a plaintiff who claims discrimination in employment may bring an action under Section 1983 for what are essentially violations of Title VII. In several cases, however, this Court has faced apparent conflicts between statutes such as Section 1983, which provide general remedies for discrimination in a variety of contexts, and subsequently-enacted, detailed remedial statutes which were designed to combat the specific wrong underlying the particular claim. In those cases, which include *Sea Clammers*, *Smith v. Robinson*, *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979), and *Brown v. GSA*, 425 U.S. 820 (1976), this Court has resolved the conflict by requiring the plaintiffs to utilize the more comprehensive, specific and contemporary remedy in those situations where the remedy was available. In each case, the alternative to the position chosen by the Court was to permit plaintiffs to undermine the effectiveness and purpose of the specific remedial scheme by avoiding the scheme entirely and proceeding directly into federal court with their claims.

Perhaps the leading case in this group is *Sea Clammers*. In that case, a group of plaintiffs brought suit in federal district court against various government entities and officials to obtain injunctive and declaratory relief and damages for alleged wrongful dumping of wastes into the Atlantic Ocean. Although the issue was not raised by the parties, this Court analyzed whether plaintiffs could utilize Section 1983 to enforce their rights under the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1251-1376, or the Marine Protection, Research and Sanctuaries Act of 1972 ("MPRSA"), 33 U.S.C. §§ 1401-45. After a careful review of the provisions of each statute, this Court concluded that Section 1983 was not available. It stated that the very existence of a complete set of express detailed remedies in both the FWPCA and the MPRSA demonstrated Congress' intent to supplant both implied private actions and any remedy that otherwise would be available under Section 1983. 453 U.S. at 21. In reaching this conclusion, this Court enunciated a broad principle on the relationship between Section 1983 and statutes containing their own comprehensive remedial schemes:

> "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."
>
> 453 U.S. at 20.

Sea Clammers sets forth the principle that the proper way to determine whether Congress intended to create a private right of action under a federal statute, as well as whether Congress intended to preserve a Section 1983 remedy inconsistent with that statute's own remedies, is first to look to the language of the statute itself. 453 U.S. at 13, 20. Elaborate and comprehensive enforcement and relief provisions may, in themselves, sufficiently demonstrate Congress' intent so that resort to secondary means of statutory interpretation, such as legislative history, is unnecessary.

Another decision of this Court which has a direct and important bearing on this case and which was ignored by the Seventh Circuit is *Smith v. Robinson*. There the plaintiffs sued state officials asserting both statutory claims under the Education of the Handicapped Act ("EHA"), 20 U.S.C. §§ 1401-61, and distinct constitutional claims under Section 1983.

The plaintiffs in *Smith v. Robinson* made it clear that their Section 1983 claims were not based on alleged violations of the EHA, but on independent assertions of constitutional deprivations. 104 S.Ct. at 3468. Thus, the issue presented to this Court in *Smith v. Robinson* is directly analogous to that presented here. Alexander's claims are clearly premised on allegations of employment discrimination which are fully remediable under Title VII. Alexander frames these two counts, however, as claims of constitutional deprivations which he is attempting to remedy through Section 1983.

In *Smith v. Robinson*, this Court made the same type of analysis of the EHA as it had previously done with the statutes at issue in *Sea Clammers*. The Court found that the structure of the EHA which, like Title VII, provides a carefully tailored administrative and judicial scheme, clearly reveals Congress' intent not to allow a plaintiff to circumvent that scheme through Section 1983. 104 S.Ct. at 3470. This Court held that the EHA provides an exclusive remedy for claims cognizable under it, and that even constitutional claims asserted through Section 1983 were preempted. *Id. Smith v. Robinson* thus shows that the principle of statutory interpretation of *Sea Clammers* extends to a broad range of potential claims, including Section 1983 claims which are alleged to derive from an independent constitutional source. If those "constitutional" claims are really in effect claims cognizable under the more specific remedial statute, then they are not independent claims and Section 1983 is preempted. Whether the plaintiff chooses to label his claim as one brought under the statute itself or as an assertion of constitutional rights is therefore immaterial.

In both *Trigg* and this case, the Seventh Circuit failed to heed the directives of *Sea Clammers* and *Smith v. Robinson*. Rather than analyze the actual language and structure of Title VII itself, the Seventh Circuit reached its conclusion based almost exclusively on certain statements from the statute's legislative history. *Trigg*, 766 F.2d at 301. This Court has frequently indicated, though, that the starting point for interpreting a statute is always the statute's language, which is conclusive, and that resort to legislative history is only desirable if the statute is unclear. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *Sea Clammers* instructs that the comprehensiveness of a statute's remedies, in itself, may be enough to establish Congress' intent not to preserve an inconsistent Section 1983 remedy. 453 U.S. at 20. Title VII provides what is probably one of the most comprehensive administrative and judicial enforcement mechanisms of all federal statutes. An analysis of legislative history is therefore neither necessary nor desirable in this case.

Although no analysis of legislative history is called for here, a determination that Congress intended to preempt Section 1983 where it is in direct conflict with Title VII is consistent with the selected excerpts of legislative history relied upon by the Seventh Circuit. Title VII does not vitiate the right to assert a Section 1983 claim. What Congress did preserve, however, was the right to assert through Section 1983 only those claims which could not be brought under Title VII. This type of distinction was recognized by this Court in *Smith v. Robinson*. In that case, the Court held that a plaintiff may not bring a Section 1983 action for a claim which is cognizable under the EHA, regardless of whether the asserted basis for the claim is the EHA or the Fourteenth Amendment. 104 S.Ct. at 3470. By contrast, this Court noted that the same principle does not apply where the plaintiff asserts a truly independent

constitutional claim, such as a claim for denial of procedural due process. Since such a claim would not be inconsistent with the EHA's scheme, a Section 1983 action is available to assert that completely independent right. 104 S.Ct. at 3470-71.

If Alexander were able to assert a factually independent constitutional claim, such as the denial of procedural due process in a termination of employment, a Section 1983 action would still be appropriate. No conflict with Title VII's scheme would be presented. The claims actually made by Alexander, however, are not independent constitutional claims. Rather, those claims arose in a factual context which places them directly within the ambit of Title VII. Merely labeling those counts as constitutional claims does not make them independent claims. In the context presented in this case, Title VII supplies a complete and exclusive remedy for Alexander.

An analysis of the legislative history of one of the statutes at issue in *Sea Clammers* further demonstrates the principle that what a statute actually provides is a far more important indicator of Congress' intent than statements from committee reports or other matter extracted from legislative history. As stated above, this Court held in *Sea Clammers* that the plaintiffs could not utilize Section 1983 to assert claims cognizable under the FWPCA because of the latter statute's own comprehensive system of remedies. 453 U.S. at 20-21. The FWPCA's Senate Report, however, seems to support the proposition that a Section 1983 remedy was preserved. The Report states that one section of the FWPCA which ultimately became law would specifically preserve *any rights or remedies under any other law*. S.Rep. No. 92-414, 92d Cong., 2d Sess. 81, *reprinted in* [1972] U.S. Code Cong. & Ad. News 3668, 3746 (emphasis supplied); *See Sea Clammers*, Opinion of Stevens, J., concurring in part, dissenting in part, 453 U.S. at 29-30. Moreover, the enacted language of the same section referred to in the report appears to direct that the authorization

of an express remedy in the statute itself shall not give rise to an inference that Congress intended to foreclose other remedies. 33 U.S.C. § 1365(e); *see also Sea Clammers*, 453 U.S. at 29 (Stevens, J., concurring in part, dissenting in part). Thus, in *Sea Clammers*, this Court held that the structure of the FWPCA as a whole compelled a conclusion that Congress did not intend to preserve Section 1983 remedies for claims within the scope of the FWPCA, despite language in the statute and legislative history seemingly to the contrary.

The remedial devices in Title VII are even more comprehensive than those under the FWPCA. Moreover, *Title VII is completely lacking in any statutory expression of intent to preserve a remedy under Section 1983.* The Seventh Circuit's legislative history approach cannot overcome the most compelling evidence of Congress' intent. The structure and language of Title VII show that Congress did not intend to preserve a Section 1983 cause of action in the situation presented in this case.

C. The Analysis Below Of *Novotny* And *Brown v. GSA* Was Inadequate

Two additional decisions of this Court, *Brown v. GSA*, 425 U.S. 820 (1976), and *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979), also relate directly to the present case. The Seventh Circuit considered both cases in its *Trigg* opinion, but gave neither the attention it merits. In both *Novotny* and *Brown*, this Court specifically examined Title VII and determined that a more general pre-existing remedy was preempted. In *Brown*, the Court held that Title VII provides the exclusive remedy for employment discrimination for federal employees. 425 U.S. at 835. The Court examined Section 717 of Title VII, 42 U.S.C. § 2000e-16, which was added in 1972 to bring discrimination in federal employment within the scope of Title VII. The Court found that the new section established complementary administrative and judicial

enforcement mechanisms designed to eradicate discrimination. After reviewing the various elements of Section 717, this Court found the section's "balance, completeness, and structural integrity" to be inconsistent with the plaintiff's contention that Title VII was designed merely to supplement other forms of judicial relief. The Court cited the statute's carefully constructed interplay of administrative and judicial enforcement powers. Quoting *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973), it held that a plaintiff may not avoid the entire Title VII remedial scheme "by the simple expedient of putting a different label on [the] pleadings." 425 U.S. at 832-33.

The Seventh Circuit in *Trigg* did note the *Brown* decision, but dismissed it as inapplicable to this case because *Brown* construed only that section of Title VII which relates to federal employees. 766 F.2d at 301. The many parallels between that section and the rest of Title VII, however, militate against such a casual treatment of that decision.

The elements of structure this Court stated to be important in *Brown* are also found in the provisions of Title VII applicable to state and local government employees such as Alexander. In both situations, a balance exists between judicial and administrative enforcement mechanisms. Both provide for EEOC enforcement; both contain initial administrative enforcement mechanisms (internal agency programs for federal employees; state agency or EEOC mechanisms for state and local government employees); the enforcement provisions of § 2000e-5 apply to each; and, in both situations, the complainant may ultimately file his own civil lawsuit in federal court, but only after exhausting the statute's administrative procedures. The differences between the two sections may be attributed to the greater degree of control Congress has over federal agencies as opposed to non-federal employers, rather than to any intent by Congress to treat federal employees differently from state and local government employees. *Compare* 42 U.S.C. § 2000e-16 *with* 42 U.S.C. § 2000e-5.

This Court's statement in *Brown* of its desire to prevent federal employee-plaintiffs from subverting the integrated and complete remedial scheme provided by Title VII reveals an intention consistent with that in *Sea Clammers* and *Smith v. Robinson* to restrict parties to precise and detailed statutory remedies when Congress has seen fit to provide such relief for specific wrongs. The similarity in structure between the remedial scheme in Title VII for federal employees and the scheme applicable to state and local government employees makes *Brown* directly applicable to this case.

Just as the Seventh Circuit distinguished *Brown* as a case involving federal employees, it dismissed *Novotny* as a case of private discrimination. *Trigg*, 766 F.2d at 301. Much of the reasoning of this Court in the *Novotny* opinion, however, also applies to this case.

In *Novotny*, this Court examined the general provisions in Title VII applicable to state and local government and private employees. The plaintiff, a discharged employee, attempted pursuant to 42 U.S.C. § 1985(3) to bring a claim for damages against his private employer. He claimed that he had been injured as a result of a conspiracy to deprive him of equal protection of and equal privileges and immunities under the laws. 442 U.S. at 369.

This Court held that, because Title VII comprehensively covered the subject matter of the plaintiff's claim, the Section 1985(3) claim could not be maintained. It stated that "[u]nder Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims." The Court then reasoned that, "[i]f a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law [and] completely

bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." 442 U.S. at 372-76.

The present case presents the same problem. Alexander's counts II and IV both allege actions which are violations of Title VII. By bringing those claims under Section 1983, however, Alexander has completely bypassed the entire carefully designed remedial scheme in Title VII. Alexander has thus brought about the same situation this Court decried in the *Novotny* opinion.

The statute at issue in *Novotny*, Section 1985(3), has much in common with Section 1983. The two statutes share a common origin in the Civil Rights Act of 1871, and the aim of both statutes was to combat the Ku Klux Klan and to provide a new federal remedy to enforce rights not adequately protected by the states. *See Allen* v. *McCurry*, 449 U.S. 90, 98-99 (1980) (discussion of Section 1983); *Monroe* v. *Pape*, 365 U.S. 167, 180-81 (1961) (discussion of Sections 1983 and 1985(3)). Moreover, both sections are merely remedial provisions which do not themselves create any rights. *Novotny*, 442 U.S. at 372; *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 617-18 (1979). There is thus no valid basis for any argument that *Novotny* is distinguishable from the present case because of differences between these two statutes.

The Seventh Circuit in *Trigg* focused on the point that *Novotny*, as a private employee, could not assert any constitutional violation against his employer. A state or local government employee, by contrast, can always make a constitutional claim simply because of who his employer is. *Trigg*, 766 F.2d at 301. This distinction, however, does not mandate that two completely inconsistent remedies be made available to state and local employees: one remedy for Title VII violations in which the plaintiff invokes the Constitution, and a different

remedy for Title VII violations where he does not. The Seventh Circuit offers no explanation why the carefully tailored scheme offered by Title VII cannot fully protect a plaintiff's rights in both situations.

The same problem this Court sought to eliminate in *Novotny* is also present in this case. In the Seventh Circuit's view, Alexander may sidestep the entire Title VII scheme and assert what are clearly Title VII claims directly in federal district court simply by designating his pleading as a Section 1983 claim. The balance, completeness and structural integrity of Title VII indicate that Congress did not intend such an incongruous result.

Older decisions of this Court concerning Title VII do not in any way compel the conclusion reached by the Seventh Circuit. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court held that 42 U.S.C. § 1981 ("Section 1981") remains available to remedy employment discrimination despite the later passage of Title VII. Section 1981 is fundamentally different from Section 1983, though. Unlike Section 1983, which merely provides a remedy and creates no right itself (*Chapman*, 441 U.S. at 617), Section 1981 creates an independent substantive right to contract ("All persons . . . shall have the same right in every State and Territory to make and enforce contracts . . ."). Further, unlike Section 1983 which requires state action, Section 1981 may be used against private entities (*e.g. Johnson*, 421 U.S. 454) and against the federal government (*Baker v. F&F Investment Co.*, 489 F.2d 829, 832-33 (7th Cir. 1973)). Given the important distinction between these two statutes, it is not inconsistent for Congress to intend that the Section 1981 remedy remains viable to redress violations of independent rights created by that statute while Section 1983, which merely provides a general remedy, is preempted in the specific area of employment discrimination by the more comprehensive remedies of Title VII.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court held that an employee had the right to seek relief under Title VII despite the fact that he had already submitted his claim to binding arbitration under a collective bargaining agreement. That case did not present any conflict between two acts of Congress as does the present case. Rather, that case involved both a contractual right and a statutory right. This Court held that "no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." 415 U.S. at 50. The present case, by contrast, presents a clear inconsistency between one statute which permits a plaintiff to proceed directly into court and another which requires the plaintiff to utilize other avenues of relief before utilizing the same federal forum. In cases such as the present one, plaintiffs are limited to Title VII, which protects all rights which could be violated by the actions alleged.

D. This Court's Most Controlling Authority Demonstrates The Error Of The Seventh Circuit's Decision

The leading decisions of this Court, viewed together, reveal the error of the Seventh Circuit's narrow view which would allow plaintiffs to choose whether to subvert the purpose of Title VII. *Sea Clammers* directs courts to evaluate the relationship between Section 1983 and more recently enacted, specific remedial statutes by first looking at the structure of the newer statute. The completeness of the remedies provided in the newer statute may in itself demonstrate Congress' intent not to preserve a pre-existing inconsistent remedy. In both *Brown v. GSA* and *Novotny*, this Court has already undertaken such an analysis of Title VII's structure, and in both cases the Court concluded that Title VII overrides the older, more general remedy. In *Brown*, the Court looked at Section 717 of Title VII; the elements the Court deemed important in that section's structure are also present in the general sections of Title VII

here at issue. In *Novotny*, the Court looked at the precise section of Title VII now under consideration and found the remedies provided therein to preempt the general remedy under Section 1985(3), a statute closely related to Section 1983. Perhaps most important is *Smith v. Robinson*, in which the Court established that the substance of the pleading is more important than the label a plaintiff affixes to it, holding that the mere pleading of a constitutional claim is not enough to avoid the scheme of a comprehensive remedial statute. The precise holdings and the broader persuasive reasoning of these cases demonstrate that the Seventh Circuit erred in reversing the dismissal of Alexander's counts II and IV.

II. THE SEVENTH CIRCUIT RULING PRODUCES AN UNFAIR AND ANOMALOUS RESULT

The Seventh Circuit's decisions in *Trigg* and in this case will yield unfortunate and anomalous consequences. As a result of these decisions, each state or local government employee-plaintiff is free to decide whether he will pursue his employment discrimination claim under Title VII, or whether he will circumvent the carefully constructed and detailed remedial scheme and proceed directly into federal court. All a plaintiff need do to bypass the entire EEOC mechanism is to allege that the employment discrimination complained of violates a right secured by the Constitution. On the other hand, a mere allegation of employment discrimination without using the magical constitutional words compels the plaintiff to exhaust the EEOC prerequisites before he is permitted to assert his claim in federal court. The Seventh Circuit's approach glorifies semantics over substance. What a plaintiff calls his claim becomes more important than what it actually is. That this result undercuts the very function of Title VII is obvious.

It also makes little sense that Congress would, in 1972, undertake to make Title VII expressly applicable to state and local government employees, if Section 1983 already gave

plaintiffs a more advantageous remedy for the same wrong by allowing them to go straight into court and obtain full relief. Title VII's 1972 amendment is understandable only when examined in light of this Court's directive in *Sea Clammers*. Congress' intent to preclude the remedy of suits under Section 1983 is made clear by the broad scope of the Title VII remedies which were ultimately enacted into law. Plaintiffs must adhere to the procedural steps prescribed in Title VII before proceeding into court. Where Title VII and Section 1983 confront one another, Section 1983 must be preempted.

Another inconsistency produced by the Seventh Circuit's approach is that state and local government employees are placed in a preferred status over all other employees. Under *Brown v. GSA*, federal employees clearly have no remedy to redress employment discrimination other than Title VII. Those who work for private employers also cannot assert employment discrimination claims under Section 1983. In its opinion in this case, the Seventh Circuit recognized this anomaly:

> "We sympathize with defendants' position and note that our holding and that of the Sixth Circuit create the anomalous situation that a federal employee is limited by the administrative procedures of Title VII while state employees are not. Because we interpret what remedies Congress has provided, we rule as we do. Congress may amend Title VII if it so chooses."

773 F.2d at 856; Appendix at 11a.

The Sixth Circuit holding referred to is in *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984). In *Day*, however, the plaintiff had merely sought to utilize Section 1983 to advance a claim that his state agency employer discriminated against him by retaliating against him for his filing of a charge with the EEOC. No constitutional claim was made. The Sixth Circuit held that "Title VII provides the

exclusive remedy when the only § 1983 cause of action is based on a violation of Title VII." 749 F.2d at 1204. It therefore affirmed the dismissal of plaintiff's Section 1983 claim.

In essence, the Sixth Circuit interpreted this Court's *Novotny* reasoning to include claims brought under Section 1983 as well as claims under Section 1985(3). In dictum, however, the Sixth Circuit went further and stated that where an employee can show that the employer's conduct violated both Title VII and rights from some other source such as the Constitution, the claim based on the other source is independent and may be redressed under Section 1983. 749 F.2d at 1205. It is far from clear, however, whether such an abstract proposition supports the Seventh Circuit's holding in this case or supports the position taken by the Park District in this petition.

Since even the Seventh Circuit recognizes the iniquity of its own decision, there is good reason for this Court to evaluate the statutes here involved. A closer examination will demonstrate that Congress did not dictate such uneven application of its laws.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW ABOUT WHICH CONSIDERABLE CONFUSION EXISTS AMONG LOWER COURTS

As stated at the outset of this petition, this Court has never decided whether a Section 1983 remedy is available for a claim of employment discrimination which is cognizable under Title VII. Although this Court has decided several cases in which the relationship between some of the post-Civil War civil rights acts and various modern specific remedial schemes were at issue, there is still considerable confusion among lower courts on the way in which the present issue should be resolved. This case presents the Court with the opportunity to provide guidance to the courts by deciding this controversial question of federal law.

In its opinion in this case, the Seventh Circuit indicated its perception that its holding is supported by the Sixth Circuit decision of *Day v. Wayne County Board of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984). Appendix at 11a. The preceding section demonstrated that the Sixth Circuit's statement is only dictum and that the meaning of the Sixth Circuit's statement is also unclear. The Seventh Circuit's opinion in this case also refers to authority from the Fifth Circuit. Yet, none of the cited Fifth Circuit cases had decided the present issue. Moreover, those cases indicate that considertion of a Section 1983 remedy in the context of employment discrimination "is necessary only if [its] violation can be made out on grounds different from those *available under* Title VII." *E.g. Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982) (emphasis supplied). That language indicates, contrary to the Seventh Circuit's apparent reading, that the Park District's position may also find support in the Fifth Circuit.

District courts in other circuits, in cases decided after *Trigg*, have taken positions directly contrary to that of the Seventh Circuit on the precise issue presented here. In *Keller v. Prince George's County Department of Social Services*, 616 F.Supp. 540 (D. Md. 1985), the court held, citing *Sea Clammers*, *Smith v. Robinson*, *Brown v. GSA* and *Novotny*, that a state employee could not maintain a Section 1983 action for employment discrimination despite the fact that the employee alleged that the employer's action violated the equal protection guarantee of the Fourteenth Amendment. Even more significant is the recent opinion in *Reiter v. Center Consolidated School District No. 26-JT*, 618 F.Supp. 1458 (D. Colo. 1985). There the court cited both *Day v. Wayne County* and *Rivera v. City of Wichita Falls*, the same Sixth and Fifth Circuit decisions cited by the Seventh Circuit in this action, as support for its holding that the plaintiff could *not* assert claims of deprivation of freedom of speech, academic freedom and freedom of association under Section 1983 because those claims were based on alleged acts

prohibited by Title VII. The court held that those claims were therefore not independent of Title VII. *Reiter*, 618 F.Supp. at 1462-63.

The wide variation in the interpretation of the leading cases in this area of the law is especially troublesome given the frequency with which this issue is likely to arise. As an example, in the Seventh Circuit alone, the past year has produced at least eight reported decisions on this precise issue. The district courts in this case (N.D. Ill.), *Trigg* (N.D. Ind.), *Ratliff v. City of Milwaukee*, 608 F.Supp. 1109 (E.D. Wis. 1985), and *Torres v. Wisconsin Department of Health and Social Services*, 592 F.Supp. 922 (E.D. Wis. 1984) held, in cases which pre-dated *Trigg*, that Section 1983 was preempted. *Strama v. City of Chicago*, 617 F.Supp. 422 (N.D. Ill. 1985) (post-*Trigg*), *Meyett v. Coleman*, 613 F.Supp. 39 (W.D. Wis. 1985), *Storey v. Board of Regents*, 600 F.Supp. 838 (W.D. Wis. 1985) and *Zewde v. Elgin Community College*, 601 F.Supp. 1237 (N.D. Ill. 1984), all reached the opposite conclusion. As is evident from recent district court opinions such as *Keller* and *Reiter*, discussed above, it is unlikely that the Seventh Circuit's perfunctory treatment of the issue in *Trigg* will in any way resolve the debate on this question in the other circuits.

It is evident even from the limited discussion above that the lower courts as a whole are confused and in conflict on the present issue. The guidance of this Court is necessary to promote consistency among the courts on this recurring issue. As this Court is aware, Section 1983 suits have increased "geometrically" in recent years. *See Pulliam v. Allen*, ____ U.S. ____, 104 S.Ct. 1970, 1988 (1984) (Powell, J., dissenting). The lower courts are, for the most part, powerless to stem the tide of these cases. This Court has given indications, however, through decisions such as *Sea Clammers* and *Smith v. Robinson*, that one thing that lower courts must do is to limit

Section 1983 to situations where its application is proper. The district court in this case sought to do just that. It held that Section 1983 is not appropriately applied where it vitiates a fair and equitable remedial system which encourages settlement and conciliation. The Seventh Circuit was in error in reversing that holding.

IV. CONCLUSION

The Seventh Circuit's opinion in this case indicates that the court felt constrained to make an anomalous ruling because of its interpretation of Congress' intent with respect to Section 1983 and Title VII. 773 F.2d at 856; Appendix at 11a. The Seventh Circuit has stated in effect that Congress has spoken and that the courts are powerless to do anything about any unfairness that results. The court is only partially correct, however. Congress has spoken, but not by scattering suggestions in Title VII's voluminous legislative history. Rather, it has spoken through the statutes it has enacted into law. The specificity and detail of Title VII, the inconsistencies between Title VII's remedial scheme and the remedies available under Section 1983, and Title VII's "balance, completeness and structural integrity" (*see Brown v. GSA*, 425 U.S. at 832) all reveal Congress' intent on this issue. Congress chose Alexander's exclusive means for relief when it made Title VII available to state and local government employees without expressly preserving the inconsistent remedy previously provided by Section 1983.

Title VII must be read to preempt Section 1983 actions where the two statutes directly confront one another. Section 1983's remedies will thus be preserved for those situations where they are needed: to assert genuinely independent rights which do not arise out of the identical facts which would support a Title VII claim. Alexander's claims were improperly brought under Section 1983 and the Seventh Circuit erred in reversing their dismissal.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of

Appeals for the Seventh Circuit and, upon review, this Court should reverse the Seventh Circuit's holding with respect to counts II and IV of Alexander's fourth amended complaint.

Respectfully submitted,

THOMAS A. FORAN
JACK J. CARRIGLIO*
JEFF D. HARRIS
DOUGLAS R. STEVENS
FORAN, WISS & SCHULTZ
30 North LaSalle Street
Suite 3000
Chicago, Illinois 60602
(312) 368-8330
Attorneys for Petitioners
Chicago Park District, et al.
**Counsel of Record*